BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Review of Commission	)	IB Docket No. 00-106
Consideration of Applications	)	
Under the Cable Landing License Act	)	

COMMENTS OF 360NETWORKS INC.

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360networks inc. ("360networks") hereby files its Comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

Through its subsidiaries, 360networks offers fiber optic capacity to communications carriers, Internet service providers, and other large end-users. The company is in the process of completing a technologically advanced, 56,300-mile telecommunications network, which will include fiber optic terrestrial networks in North America and Europe and undersea cables linking North America, South America, and Asia. Accordingly, 360networks fully supports the Commission's efforts to streamline the application process for obtaining a cable landing license. 360networks wishes to emphasize that the staff of the Telecommunication Division, and particularly the Policy and Facilities Branch, has been extremely cooperative in expediting those

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[1] In re Review of Commission Consideration of Applications Under the Cable Landing License Act, *Notice of Proposed Rulemaking*, IB Docket No. 00-106, FCC 00-210 (released June 22, 2000) ("Notice").

360network applications that required prompt approval. The delays the Notice seeks to alleviate are a result of the process itself. Adopting the proposals set out here should, in fact, assist the staff.

The growth in demand for international communications services has resulted in a shortage of capacity on cables that are able to carry these services. In order to alleviate this shortage and to meet the demands of the market, 360networks and competitors have filed applications for licenses to land and operate new submarine cables in the United States. The processing of these applications, however, has been hampered by antiquated regulatory procedures. The need for streamlined procedures that result in the expediting of license applications is pressing, lest potential competition to existing cable owners be sacrificed. Any streamlined process should provide a means by which, in certain circumstances, the competitive effects of granting a new license can be scrutinized by the Commission. Yet, such scrutiny should not come at the expense of delaying the grant of licenses that do not have potential for anticompetitive effects.

In the Notice, in order to address potential anticompetitive effects, the Commission proposes to require applicants seeking streamlined review to demonstrate, prior to obtaining such review, that the grant of a license will not harm competition. As opposed to concentrating on specific applications that may raise competition issues, the Commission's proposal requires all applicants seeking streamlined review to make this demonstration and therefore presumes that all applications can have the potential for anticompetitive effects. This process undermines the Commission's goal of creating an expeditious streamlined application process because applicants will need more time to prepare their applications and the Commission will need more time to

review whether applicants have made the requisite showing. In addition, the proposed demonstration requires applicants to incur additional costs to qualify for streamlined review.

360networks submits that a streamlined review process should presume that the addition of a new cable on any route will promote competition unless the Commission perceives valid concerns about the application's impact on competition. Accordingly, 360networks recommends that the Commission review all applications on a streamlined schedule unless the application is opposed upon reasonable grounds within twenty-eight (28) days from public notice.

II. THE COMMISSION'S POLICY OBJECTIVES CORRECTLY FOCUS ON CREATING AN APPLICATION PROCESS THAT IS EXPEDITIOUS BUT THAT ALLOWS FOR COMMISSION SCRUTINY OF POTENTIAL ANTICOMPETITIVE EFFECTS.

360networks supports the Commission's policy objectives of creating an application process that is expeditious but, where appropriate, allows the Commission to scrutinize the effects the grant of a license would have on competition. It is clear that the current application process cannot keep pace with the explosive demand for capacity and the advance of technological development. A streamlined process that removes regulatory hurdles to gaining rapid market entry is needed in order to meet the demand for international communications services. An ideal streamlined process would allow applicants to be licensed in a short time-period, thereby permitting them to: (1) satisfy the market demand for capacity; and (2) better orchestrate cable installation with the few contractors that currently lay undersea cable. However, expediency must be balanced with the need to protect against potential harms to competition. Accordingly, a streamlined process must provide a means by which certain applications are directed to the Commission for closer scrutiny. Although the Notice acknowledged the significance of these policy objectives, 360networks believes that the

streamlined application process proposed by the Commission is not the optimum vehicle for accomplishing these objectives.

III. THE COMMISSION'S PROPOSED STREAMLINED APPLICATION PROCESS MAY UNDERMINE ITS OBJECTIVES BECAUSE IT COULD IMPOSE COSTLY BURDENS ON APPLICANTS AND UNNECESSARY DELAYS IN THE APPLICATION PROCESS.

In the Notice, the Commission proposes to implement a process whereby an applicant must make one of three detailed demonstrations before it can qualify for review on a streamlined basis. An applicant must demonstrate one of the following: "(1) a demonstration that the route on which the proposed cable would operate is or will become competitive; (2) a demonstration of sufficient independence of control of the proposed cable from control of existing capacity on the route; [or] (3) evidence of certain pro-competitive arrangements."[2] Besides injecting a new level of ambiguity into the application process, these required demonstrations will increase applicants' costs and create unnecessary delay.[3]

A. The Commission's Required Demonstration Could Impose Costly Burdens on Applicants.

Each of the options for obtaining streamlined review requires an applicant to conduct new analyses regarding competition prior to submitting an application. The Commission anticipates that an applicant seeking to qualify for streamlined review under the first option

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2 Notice, at ¶ 20.

3 Ambiguity will be introduced because of the lack of discernable standards for determining whether an applicant has made the required demonstration. Although 360networks is confident that the Commission will flesh out these standards in its order, an analysis of the effects the granting of an application will have on competition will remain ambiguous until substantial precedent is established.

"demonstrate that there are at least three independently controlled cables, including the applicant's proposed cable, serving the route on which the applicant wishes to operate."[4]

While such a demonstration appears fairly straightforward, 360networks is of the view that this demonstration could require applicants to conduct additional research and incur additional costs simply to prepare an application that would indisputably meet this burden.[5] Although requiring applicants to demonstrate that three cables serve a route may be simple, requiring applicants to demonstrate that they be "independently controlled," is not because it requires applicants to submit information about how the ownership structure of a competitor's cable actually works. Applicants are required to include information regarding ownership of "the three key submarine cable facilities."[6] Presumably, applicants will need to show, by providing attribution data on who owns the key submarine cable facilities for each cable, that each of the cables is independently controlled. Such information may be difficult or time-consuming to obtain.

The other two options for demonstrating that an application qualifies for streamlined review also are costly and burdensome. Under the second option, in introducing the concept of the "key applicant group," the Notice first creates a tripartite structure, which focuses on ownership of the "three key submarine cable facilities" and is dependent on the notion of "firm control."[7] Then, entities deemed to be part of the key applicant group must provide details of

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4 Notice, at ¶ 28.

5 In contrast, the existing rules require applicants to expend modest amounts to prepare applications. See 47 C.F.R. § 1.767 (1999).

6 Notice, at ¶ 29.

7 Id. at ¶ 33.

their ownership shares in the existing, and in some cases, planned, capacity on the route.[8] This "proposed streamlining option would consist of a demonstration that entities in the key applicant group of a proposed cable control less than 50 percent of existing wet link capacity on the route to be served by the proposed cable."[9] Thus, this demonstration would require applicants to investigate the total wet link capacity on the route, as well as what percentage of the capacity competitors control. Such a showing could be difficult to verify and time consuming to make.

Under the third option, the applicant is required to make a showing that the ownership agreements, and the provisions in capacity use agreements relating to interconnection and backhaul, are pro-competitive. 360networks, as a matter of corporate policy, encourages collocation, interconnection, and the provision of competitive backhaul. But such policies are impacted by availability of facilities, local zoning requirements, and foreign regulatory policies. It would be extremely difficult to craft a rule or set of rules which could fairly encompass the alternatives that create competitive conditions. This will be particularly true with respect to destinations that have not been traditionally served by undersea cables. The benefit of such rules is simply not worth the cost and effort to create and implement them.

In sum, requiring applicants to supplement their applications with the information the Notice proposes will increase the costs of preparing the applications. As Commissioner Susan Ness noted in her separate statement to the Notice: "The Commission should try to avoid inadvertently raising the costs of entering the undersea cable market in the course of 'streamlining' its processes."[10] The three options that permit an application to be streamlined

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8 See id. at ¶ 36.

9 Id. at ¶ 34.

10 Separate Statement of Commissioner Susan Ness at 2 (appended to the Notice).

will require applicants to incur costs that are not warranted in most cases. That the benefits of qualifying for a streamlined review will outweigh the burdens and additional costs incurred by applicants is not readily apparent.

B. The Commission's Required Demonstration Can Create Unnecessary Delay.

The Commission's proposal places on all of the applicants the burden of demonstrating that the granting of a license will not harm competition. This process will delay the granting of licenses, thereby defeating the Commission's policy objective of expediting applications.

Under the Commission's proposed application process, all applicants will be required to invest more time and money into preparing their applications to show that they meet one of the eligibility requirements for obtaining streamlined review. Moreover, the Commission's review of the anticompetitive effects of an application is time consuming and will impose new burdens on the Commission's staff. Instead of closely scrutinizing those applications that truly provide applicants with the opportunity to engage in anticompetitive conduct, the Commission's staff will be required to conduct an analysis of how every application meets the criteria to determine whether the application should be streamlined.

The Commission's review will not be limited to an analysis of brightline criteria such as whether the applicant owns the majority of the key submarine cable facilities on a route. Rather, 360networks is concerned that, regardless of how sophisticated a rule the Commission adopts, it will still involve assessment of amorphous criteria such as whether a cable is "independently controlled" or whether certain privately negotiated contract provisions are sufficiently pro-competitive. Such a review would result in excessive delay and is counterproductive to the Commission's policy objective of creating an expeditious application process.

Removing the delays associated with the application process is the primary objective in creating a streamlined application process. However, the Commission's proposal to require

applicants to demonstrate that their application does not pose competition concerns may create more delays both in the application's preparation and the Commission's review. Accordingly, the Commission should focus on adopting a streamlined process that avoids such delays.

IV. THE COMMISSION SHOULD ADOPT A STREAMLINED PROCESS THAT PRESUMES THAT THE ADDITION OF A NEW CABLE WILL FURTHER COMPETITION UNLESS ANOTHER PARTY OR THE COMMISSION RAISE SUBSTANTIVE CONCERNS.

360networks urges the Commission to create a streamlined review process that does not impose additional burdens on applicants except when necessary to address legitimate competitive issues. To that end, 360networks recommends that the Commission start from the presumption that all applications for the addition of a new cable qualify for streamlined review. The Commission should not attempt to differentiate between applicants in advance. Rather, the Commission should only remove an application from streamlined review if there are well-founded competitive concerns. Under this proposal, within the first fourteen (14) days from the date upon which the application is placed on public notice, a party may petition to deny the application streamlined processing. If the Commission is of the view, based on such a petition or upon its own review, that the application raises legitimate competitive concerns,[11] it will issue a public notice, within twenty-eight (28) days of the public notice of the filing, announcing that the application will not be reviewed on a streamlined basis. At that point, the usual pleading cycle would begin. A party seeking non-streamlined processing would, of course, have the burden of showing that it has valid concerns about the competitive effects of granting the application. As the Commission itself has noted, there are very few petitions filed against cable landing license applications. As long as the Commission ignores "strike" petitions, 360networks believes

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[11] The Commission will, of course, analyze the application in light of the policy issues set forth in the Notice.

(though it may appear counterintuitive) that the process outlined above is more likely to actually streamline the grant of all but a few applications.

Consistent with the proposal already contained in the Notice, the Commission should grant a streamlined application for a cable landing license by public notice within sixty (60) days of the application being accepted for filing.[12] Granting an application by public notice will satisfy the requirement under the Cable Landing License Act ("CLLA") that grants be issued by "written license" if the public notice includes the routine conditions for grant of such licenses.[13] This approach has the added benefit of ensuring uniformity among the conditions imposed on cable landing licensees. Moreover, a sixty (60) day time frame should provide the State Department with ample time to complete its review and provide its consent to the Commission, particularly as applicants for cable landing licensees routinely serve the appropriate State Department personnel with the application at the same time it is filed at the Commission.

In conjunction with this processing scheme, the Commission should maintain the current requirements for filing cable landing license applications. No new information is necessary for other parties or the Commission to make an initial determination about whether an application should be opposed. The current application requirements set forth in 47 C.F.R. § 1.767 are sufficient for the Commission and other parties to make an initial determination about an applicant's potential for anticompetitive conduct. For example, § 1.767 requires that applicants include a "list of the proposed owners of the cable system, their voting interests, and their ownership interests by segment in the cable." Id. Based on this information alone, the

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12 Notice, at ¶ 54 (proposing that a streamlined application be granted 60 days from the date the International Bureau issues a public notice accepting the application for filing).

13 See Notice, at ¶¶ 72-77.

Commission or another party would be able to determine whether the application warrants closer scrutiny.

V. THE COMMISSION SHOULD ADOPT RULES PERMITTING CABLE LANDING LICENSEES TO PERFORM *PRO FORMA* TRANSACTIONS WITHOUT SEEKING PRIOR APPROVAL.

The Commission should adopt rules permitting cable landing licensees to provide subsequent notification of *pro forma* transfers of control and assignments, as opposed to requiring prior approval. A similar proposal was considered and rejected in IB Docket No. 98-118.[14] While the Commission agreed that additional flexibility for cable landing licensees to perform *pro forma* transactions would serve the public interest, it determined that it could not adopt the proposal because it lacked authority to forbear from the requirements of the CLLA under Section 10 of the Communications Act.[15] However, as explained below, the Commission's forbearance is not implicated by a proposal to allow subsequent notifications for *pro forma* transactions.

The CLLA simply requires that a license be obtained from the President in order to "land or operate in the United States any submarine cable directly or indirectly connecting the United States with any foreign country."[16] Executive Order No. 10530 delegated this Presidential authority to the FCC, provided that the approval of the Secretary of State is obtained before grant of a license under the CLLA. Once an initial license has been obtained, there is no reason to require State Department approval of *pro forma* transactions. In approving the initial license, the

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[14] In re 1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations, *Report and Order*, 14 F.C.C.R. 4909, 4944 at ¶ 85 (1999).

[15] See id. at ¶ 86.

[16] 47 U.S.C. § 34.

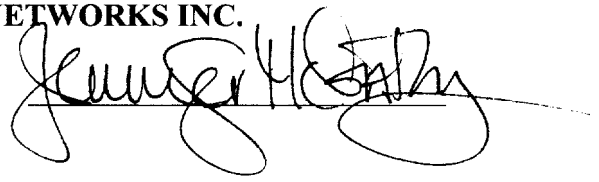
State Department would already have passed on the location of the cable and the qualifications of its owners. Of course, State Department approval would continue to be required for substantial (non *pro forma*) transfers of control or assignments of cable landing licenses.

VI. CONCLUSION.

For the foregoing reasons, 360networks respectfully urges the Commission to streamline the cable landing license application process consistent with the comments herein.

Respectfully submitted,

360NETWORKS INC.

By: 

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CERTIFICATE OF SERVICE

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